STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

NORTH SHORE GAS COMPANY	)	
	)	
Proposed General Increase in Rates for Gas Service.	)	No. 09-0166
	)	
	)	No. 09-0167
THE PEOPLES GAS LIGHT & COKE COMPANY	)	
	)	
	)	(consolidated)
Proposed General Increase in Rates for Gas Service.	)	
	)	

THE PEOPLE OF THE STATE OF ILLINOIS' REPLY TO NORTH SHORE GAS COMPANY'S AND PEOPLES GAS LIGHT AND COKE COMPANY'S RESPONSE TO THE PEOPLE'S MOTION FOR A PARTIAL STAY OF THE COMMISSION'S JANUARY 12, 2012 ORDER OR, IN THE ALTERNATIVE, MOTION FOR COLLECTION OF RATES SUBJECT TO REFUND

The People of the State of Illinois, by and through Lisa Madigan, Attorney General of the State of Illinois ("the People"), pursuant to 83 Ill. Admin. Code 200.190(e), hereby reply to North Shore Gas Company's and Peoples Gas Light & Coke Company's ("the Companies") February 3, 2012 Response to the People of the State of Illinois' Motion for a Partial Stay of Commission's January 12, 2012 Order, Or in the Alternative, Motion for Collection of Rates Subject to Refund.

I. INTRODUCTION

Contrary to assertions by the Companies, the People's Motion satisfies the requirements for a stay and protects the customers of Peoples Gas Light & Coke Company ("Peoples Gas") and North Shore Gas Company ("the Companies" or "PGL/NS") from incurring extra, unlawful surcharges as a result of the Commission's approval and permanent implementation of Rider VBA, a mechanism designed to *guarantee* that the Companies recover the revenue requirement established in this case for the residential and small commercial customer classes. This revenue

guarantee persists regardless of whether the revenue requirement established in the most recent rate case is actually needed or appropriate going forward, and in spite of the fact that a utility's expenses and revenues are dynamic and ever-changing. Under Rider VBA, when customers use less natural gas than anticipated in the Companies' forecasts, as filed with the Commission, surcharges appear on customer bills. Rider VBA is nothing more than a mechanism to guarantee the recovery of a designated amount of revenues – *not costs* – and creates a shift in risk of revenue recovery historically borne by shareholders.

Conspicuously absent in the Companies' Response to the People's Motion is any argument or even suggestion that the Companies will be unable to recover their "fixed costs" without Rider VBA. Indeed, Peoples Gas and North Shore are the only utilities in the state that enjoy the revenue guarantee established by the approval of Rider VBA. Section 9-201 of the Public Utilities Act ("the Act") requires that the Commission establish a revenue requirement that permits the utilities to recover their reasonable and prudent costs and an *opportunity* to earn a reasonable return on their utility plant – not a guarantee. Clearly, granting the People's Motion to Stay (or in the alternative, permitting collection of Rider VBA revenues subject to refund) will not prevent the Companies from recovering its costs or earning its authorized return.[1]

But perhaps most importantly, the Companies fail to address the legal infirmity inherent in the Commission's approval of a rider to recover lost revenues: namely, the legal analysis that serves as the underpinning for the Commission's approval of Rider VBA, both the pilot and permanent versions, has been rejected twice now by Illinois Appellate Courts.

[1] Indeed, the record shows that the Companies, since the inception of Rider VBA, saw a drop in their reported return on equity with Rider VBA. *See* Order of Docket Nos. 09-0123/09-0124 (cons.); 10-0237/10-0238 (cons.).

For the reasons discussed below, the Commission should grant the People's Motion for a Stay of Rider VBA, or in the alternative, order the Companies to collect Rider VBA revenues subject to refund.

II. REPLY to PGL/NS RESPONSE

A. Recent Illinois Appellate Court Rulings Suggest the People Are Likely to Succeed on the Merits.

As the People argued in its Motion[2], and the Companies agreed in their Response[3], the Commission is guided by the same factors traditionally used by courts when evaluating whether the grant of a stay is appropriate: (1) the irreparable harm petitioners will suffer if the stay is denied; (2) the harm to other parties that would result from the issuance of a stay; and (3) the petitioner's likelihood of prevailing on the merits. *Commonwealth Edison Company,* Ill. C.C. Docket No. 87-0427; 87-0169; 88-0189; 88-0219; 88-0253 On Remand; 90-0169 Consol., 1993 Ill. PUC LEXIS 21 (Order, January 8, 1993) (utility demonstrated irreparable harm but was not entitled to stay where it failed to adequately address the other two factors). *See also City of Chicago v. Illinois Commerce Comm'n,* 133 Ill.App.3d 435 (First Dist. 1985). As discussed below, the People have satisfied these criteria.

In a portion of their Response labeled "Background Facts," the Companies inadvertently highlight why the People are likely to prevail upon the merits in an appeal of Rider VBA, and hence why the Motion to Stay should be granted: the foundation for the Commission's approval of the four-year pilot Rider VBA, as articulated in the Commission's 2008 Peoples Gas/North Shore Gas Rate Order, and the permanent rider approved in this docket, was that order's flawed legal analysis regarding the use of riders, and in particular, decoupling riders. PGL/NS Response

[2] People's Motion for Stay at 5-6.
[3] Companies' Response at 5.

at 3 ("In approving the pilot program, the Commission conducted a careful analysis of the legal arguments raised by the AG and other opponents of the rider and held: "The sum of our extensive review shows that Rider VBA complies with legal requirements, contains no other infirmity, and falls under our authority.") ICC Docket Nos. 07-0241, 07-0242, Order of February 5, 2008 at 150. Unfortunately, the Commission proceeded to rely upon that very same "careful analysis of the legal arguments" in the 2008 Rate Order for its approval of Commonwealth Edison Company's Rider SMP in Docket No. 07-0566, which was later reversed by the Second District Appellate Court in the AG's appeal of that rate order. *See Commonwealth Edison Co. v. Illinois Commerce Comm'n, 405 Ill.App.3d 389, 409-415, 937 N.E.2d 685 (2d Dist. 2010*) ("*ComEd*"). In reversing the Commission's approval of the rider, the Court held that the Commission's approval of a rider to recover the costs of the AMI Pilot constituted single issue ratemaking, which is prohibited. *Id.* at 409-15.

Likewise, in the People's appeal of the Commission's approval of Rider ICR in ICC Docket Nos. 09-0166/09-0167, the First District Appellate Court ruled on September 30, 2011 that the Commission's legal analysis approving the infrastructure rider was flawed, and that the rider approved in that order constituted illegal single-issue ratemaking. *The People ex rel. Madigan v. Illinois Commerce Comm'n,* Case Nos. 1-10-0654, 1-10-0655, 1-10-0936, 1-10-1790, 1-10-1846 and 1-10-1852 *(*slip op. of September 30, 2011) ("*Madigan")*. In this 2009 PGL/NS rate case, like the Commission's ill-fated approval of Rider SMP in Docket No. 07-0566, the Commission relied upon the same legal analysis first articulated in the 2008 PGL/NS Rate Order – an analysis that rejected the AG's argument that the approval of the rider constituted unlawful single-issue ratemaking:

> Indeed, we find that the specific provisions of Rider ICR reconcile with the Illinois Supreme Court's recognition that ―riders can

> generally be expected to provide a more accurate and efficient means of tracking costs and matching such costs with recoveries than would base rate recovery methods. *Id*. at 138-139 (emphasis added). We recall Mr. Scott's testimonial assertion that rider treatment provides assurance to ratepayers that they will only pay for the actual costs of infrastructure in the ground. On all these legal and factual grounds, the Commission concludes that the rule against single-issue ratemaking is not a bar to our adoption of Rider ICR…

ICC Docket No. 09-0166, 09-0167, Order of January 21, 2010 at 175-176.

In its recently issued September 30, 2011 opinion, the First District Appellate Court rejected the Commission's reasoning, and held that the approval of Rider ICR constituted unlawful single-issue ratemaking. The appellate court's clear enunciation and affirmation[4] of the limited circumstances under which riders may be approved again makes clear that Rider VBA fits none of the criteria outlined by the Court for lawful rider recovery of expenses. Citing the Court's decision in the *ComEd* case, the Court concluded that exceptional circumstances necessary to justify a rider arise only when the proposed rider is designed to "recover a particular cost if (1) the *cost* is imposed upon the utility by an external circumstance over which the utility has no control and (2) the *cost* does not affect the utility's revenue requirement." *Madigan, slip op. at 21-22.* (emphasis added). The Court elaborated on this two-part test, noting:

> In other words, a rider is appropriate only if the utility cannot influence the cost (*Citizens Utility Board,* 166 Ill.2d at 138 ['a rider mechanism is effective and appropriate for cost recovery when a utility is faced with unexpected, volatile, or fluctuating expenses') and the expense is a pass-through item that does not change *other expenses or increase income* (*Citizens Utility Board,* 166 Ill.2d at 138 (*a valid rider has no 'direct impact on the utility's rate of return*').

Id. at 22 (emphasis added, citations added); citing *ComEd,* 405 Ill.App.3d 389, 413.

[4] The Court relied on the Second District's decision in *Commonwealth Edison Co. v. Illinois Commerce Comm'n,* Ill. App.3d 409-415 (2nd Dist. 2010), which reversed the Commission's approval of Rider SMP, ComEd's smart grid pilot rider, and enunciated a clear test for when riders can be employed as lawful cost recovery mechanisms.

The Illinois Supreme Court denied both the Commission's and the Utilities' requests for rehearing in both the *ComEd* and *Madigan* cases. The two-part rider test is the law of the State. As noted, in the People's Motion for Stay, Rider VBA passes neither of these tests. *See* Motion for Stay at 8-9. No mention is made in the Commission's January 12, 2012 Order of a particular expense or cost to be recovered through Rider VBA. That's because Rider VBA recovers no particular expense, but rather is designed to recover lost revenues associated with non-usage of natural gas. This characteristic of the rider fails the first prong of the test. Secondly, the evidence shows that Rider VBA has a direct impact on the Companies' return on equity, as revealed in the Commission's Rider VBA reconciliation orders, thereby failing the second prong of the two-part test established by the appellate court in *ComEd* and affirmed in *Madigan*. *See* ICC Docket No. 10-0237,10-0238 (cons.), Order of March 9, 2011 at 3, 6; ICC Docket No. 09-0123 (North Shore), Order of February 10, 2010 at 12; ICC Docket No. 09-0124 (PGL), Order of February 10, 2010 at 12.

In the instant case, the Commission's Order inexplicably makes no mention of the legal challenges to Rider VBA raised by the AG throughout the case, including the People's citation to the two recent appellate court decisions cited above and the two-part test for lawful rider approval articulated by the Courts. Not only has the Commission not retreated from the very legal analysis that led to the reversal of both of its recent rider approvals, but appears ambivalent to the possibility that the lawfulness of the rider is at issue and that another rider reversal may be imminent. Indeed, the Commission's Order never once discusses the alleged legal infirmities inherent in the rider – including unlawful single-issue ratemaking -- raised by the Attorney General's Office in its testimony and briefs.

The Companies complain in their Response that "[r]ather than actually demonstrating a likelihood of success on the merits, the AG has reiterated the same invalid arguments made in prior briefs as to why the Commission should not make Rider VBA permanent." PGL/NS Response at 6. The Companies assert that they "already have briefed at great length and thoroughly debunked the AG's legal arguments, showing that each one is incorrect, overstated, and/or misapplied as to Rider VBA and the facts of this proceeding," and note that the Commission rejected the AG position. *Id.* This rhetoric, however, fails to address the arguments raised by the People in their Motion for Stay, i.e. that Rider VBA fails the two-part test for the lawful use of riders, and that the Commission itself never addressed legal arguments in its Order at all. Indeed, the only substantive response to the arguments presented by the Companies to the AG Motion is to say that "every rider mechanism must be analyzed individually." PGL-NS Response at 7. While that is true, the Companies have not explained why the two-part test established in *ComEd* does not apply here, or why the Commission's silence on the issue of the lawfulness of Rider VBA in its Order suggests the AG is unlikely to prevail on the merits of its Rider VBA appeal.

The Companies offer other irrelevant, trivial arguments in response to the Motion, such as that the Court in the 1958 *City of Chicago v. Illinois Commerce Comm'n* case[5] affirmed the Commission's approval of a rider. PGL-NS Response at 7. In no way did the People's Motion assert to the contrary. What the Companies fail to point out is that the Court in *ComEd* distinguished the recovery of natural gas supply through a rider in the *City of Chicago* case, the costs of which were and are set by a federal agency outside of the control of the Company, from the recovery of the expenses at issue in *ComEd.* The Court found that the *City of Chicago* gas supply expense fit within the criteria of the two-part test established by the Second District. *See*

[5] *City of Chicago v. Illinois Commerce Comm'n,* 13 Ill. 2d 607, 614 (1958)

ComEd, 405 Ill.App.3d at 409-415. In its thorough review of Illinois law, the Court reconciled and distinguished past cases affirming Commission approval of riders that involved the recovery of expenses related to the purchase of natural gas (*City of Chicago),* federally-mandated environmental remediation costs and a municipality's franchise fee. The Court concluded:

> In each instance, the expense was an externality imposed on the utility, and the expense was passed directly on to the consumer without affecting the utility's return on investment.

Id. at 414.

Moreover, the fact that the Commission apparently rejected the arguments of the People regarding Rider VBA, and, instead, sided with the Companies' proposal does not constitute a failure to demonstrate a likelihood of success on the merits. Indeed, if the Commission's rejection of a party's argument constituted evidence of an unlikelihood of prevailing on the merits, no party whose position was first rejected by the Commission could ever obtain a stay.

The fact is, Section 10-113 provides the Commission with discretionary power to stay the effect of its orders. 220 ILCS 5/10-113(a). Moreover, the Illinois Supreme Court refused to adopt a rigid checklist limiting stays to cases satisfying every single one of these factors. In *Stacke v. Bates,* 138 Ill. 2d 295 (1990), the Court held that "it is not desirable to adopt a specific set of factors" governing the granting of stays, and expressly rejected "a ritualistic formula which specifies the elements a court may consider in passing on a motion to stay, and which limits the Court's consideration of those elements." *Stacke,* 138 Ill.2d at 304-305, 308. Instead, a "court should have a wide degree of latitude when exercising its discretion." *Id.* at 305. The Court in *Stacke* made clear that the "likelihood of success" criterion is not the impediment to winning a stay that the Companies' Response suggests it is. A party seeking a stay is not required "to show a probability of success on the merits" in every case. *Id.* at 309. Rather, it is sufficient to

"present a substantial case on the merits and show that the balance of equitable factors weighs in favor of granting the stay." *Id.*

No where in the Companies response do they acknowledge that the Commission's decision to make Rider VBA permanent is a question of law, and that the Commission's interpretation of questions of law is not binding on a reviewing court. *Business & Professional People for the Public Interest v. Illinois Commerce Comm'n,* 136 Ill.2d 192, 204, 555 N.E.2d 693 (1989) (*"BPI I"*). The People's appeal of Rider VBA involves the fundamental question of whether more than 100 years of ratemaking under the Public Utilities Act, which permits a utility to recover its expenses and be provided the *opportunity* to earn a reasonable return on its investment through the filing of a Section 9-201 rate case, should be upended to protect the Companies from any future revenue losses associated with decreased natural gas usage. 220 ILCS 5/ 9-201. As the People noted in their Motion, the Commission's decision to approve Rider VBA assumes that the revenue requirement established in this case for the Rate 1 and Rate 2 classes must be guaranteed in perpetuity, or at least until the next time the Companies file a rate case under Section 9-201 of the Act. Nothing in the record, Illinois or federal caselaw suggests that is an appropriate or lawful assumption. Illinois case law, the Public Utilities Act and the lack of substantial evidence to justify the adoption of Rider VBA all support the conclusion that the People have presented "a substantial case on the merits." *Stacke,* 138 Ill.2d at 309. The Companies' arguments that the People failed to make such a showing should be rejected.

The Companies also fail to address the point made in paragraph 19 of the People's Motion for Stay: the People are also likely to prevail on the merits because Section 8-104 also limits cost recovery for energy efficiency programs to "costs for reasonably and prudently

incurred expenses for cost-effective energy efficiency measures." 220 ILCS/58-104(a). Lost revenues associated with customer efficiency investments and the reductions in natural gas usage they bring are not included in this definition of recoverable costs. Likewise, 8-104(d) places a cap on any utility lost revenue exposure as a result of energy efficiency programs, as well as a limit on how much customers should pay for utility-provided efficiency programs.[6] Rider VBA, to the extent that it assesses surcharges for declines in usage related to multiple sources (including efficiency and conservation), requires ratepayers to pay more for achieving efficiency gains as a customer class than envisioned under Section 8-104 of the Act. This is yet another basis for appellate court reversal of the Commission's adoption of Rider VBA.

In addition, it is undisputed that the Company never demonstrated through evidence that the surcharges to be collected under Rider VBA are financially necessary to enable the Company to recover its costs. The Company admitted that neither residential nor overall delivery service revenues are declining. Tr. at 81-83. PGL/NS witness James Schott argued that Rider VBA will reduce the utility's "throughput incentive" – the financial incentive to encourage natural gas sales. PGL Ex. 1.0 at 16. Conspicuously absent from this point, however, was any kind of a proposal from the Companies to tie revenue losses from the Companies' energy efficiency programs to any forecasted revenue losses, or to commit to step up efforts to promote efficiency – proposals that usually accompany decoupling plans approved in other jurisdictions.

[6] Section 8-104(d) places an explicit cap on efficiency spending, which will limit the Companies' lost revenue exposure: "…a natural gas utility shall limit the amount of energy efficiency implemented in any 3-year reporting period established by subsection (f) of Section 8-104 of this Act, by an amount necessary to limit the estimated average increase in the amounts paid by retail customers in connection with natural gas service to no more than 2% in the applicable 3-year reporting period. The energy savings requirements in subsection (c) of this Section may be reduced by the Commission for the subject plan, if the utility demonstrates by substantial evidence that it is highly unlikely that the requirements could be achieved without exceeding the applicable spending limits in any 3-year reporting period." 220 ILCS 5/8-104(d).

The only other "evidence" supplied to support the rider comes from NS-PGL witness Grace, who again emphasizes the Companies' view that all costs are fixed, and because 30% of North Shore's and 36% of Peoples Gas's costs will be recovered through volumetric charges, Rider VBA is needed to ensure recovery of the revenue requirement established in the Commission's order in this docket. NS Ex. 12.0 at 49, 51; PGL Ex. 12.0 at 52. GCI witness Dismukes analyzed both the rationale supplied by the Commission, in its 2008 Order, as well as the Companies' claims in this docket that Rider VBA is needed to recover its "fixed" costs. His unrebutted testimony demonstrated that the conditions that led the Commission down the decoupling path in 2008 either no longer apply (high natural gas prices) or did not and will not come to fruition (significant revenue losses associated with NS-PGL energy efficiency programs). *See, e.g.,* GCI Ex. 4.0 at 8-20; 28-30.

The Companies have shown no financial harm as a result of the Chicagoland efficiency program nor any forecast of financial harm related to the newly-initiated statutory efficiency programs that necessitate a decoupling mechanism and the permanent adoption of Rider VBA. Similarly, there is no evidence that the Companies have altered their promotion of natural gas usage either prior to, and after the adoption of Rider VBA. Likewise, the Companies have made clear that they intend no increase in the promotion of or spending on energy efficiency programs with Rider VBA. Further, there is simply no performance-based evidence detailing an incremental investment in or further promotion of efficiency efforts that can be specifically tied to Rider VBA and the alleged elimination of a throughput incentive that supports the continuation of Rider VBA. *Id.* at 29-30.

Moreover, Rider VBA is contrary to the regulatory framework established under Section 9-201 of the Act, as well as the Commission's Part 285 test year rules. 220 ILCS 5/9-201; 83

Ill.Admin.Code Part 285. Under the statutory framework for regulation of a public utility, the regulatory lag that accompanies utility investment and revenue recovery in rates operates to help ensure that utilities invest prudently. It is at the heart of the ratemaking formula: calculating costs and the value of the utility's rate base with test year data and applying an appropriate rate of return to arrive at the utility's revenue requirement upon which rates going forward are set. This process, however, does not envision any *guarantee* of a revenue requirement. *See* AG Motion for Stay, par. 23-26. Indeed the test year process itself recognizes that utility expenses and revenues are ever-changing, hence the test year "snapshot" approach to ratemaking. While rates are set based on that specific revenue requirement, monopoly regulation in no way assumes that utility expenses and revenues will remain static or that the utility shall be *guaranteed* a certain level of revenues. The opposite is true. NS-PGL witness Schott confirmed this dynamic and ever-changing nature of utility expenses, revenues and cost of capital. Tr. at 51. When a utility believes the revenues it is collecting are insufficient to provide such a recovery, it can and does file a rate case. Rider VBA is an unneeded, unlawful tweaking of this ratemaking process.

Rider VBA reconciliation proceedings, too, in no way demonstrate that the revenues collected under Rider VBA are "needed" to recover the Companies' fixed costs. Reconciliation proceedings amount to nothing more than a matching of the forecasted surcharges and credits with the actual revenue amounts collected. There is no examination of the Companies' underlying costs, or whether those Rider VBA surcharges or credits in the preceding year were in any related to the Companies' cost of service. The recent Rider VBA reconciliations of 2008 and 2009 VBA revenues are a case in point. Any effort by the Attorney General's Office to explore the underlying assumptions or the *need* for the rider was flatly rejected by the administrative law judges and, ultimately, the Commission. *See* ICC Docket No. 10-0237,10-

0238 (cons.), Order of March 9, 2011 at 3, 6; ICC Docket No. 09-0123 (North Shore), Order of February 10, 2010 at 12; ICC Docket No. 09-0124 (PGL), Order of February 10, 2010 at 12. The reconciliation process under the new, permanent Rider VBA, will trigger annual adjustments (rather than the current monthly adjustments) tied to the revenue requirements established in this case. Like the existing pilot reconciliations, in no way will these proceedings examine the relationship between the Companies' underlying costs and the revenues collected or credited through Rider VBA. The critical legal defect in the rider is the assumption inherent in the mechanism that the particular rate case revenue requirement established in this case is an amount that must be ensured through true-up adjustments.

Finally, the Companies also complain that the AG Motion paints a distorted picture of the status of other utilities in the State regarding fixed cost recovery guarantees. The Companies note that the Commission approved rate designs for Ameren Illinois and Nicor Gas that currently collect 80% of their costs through the fixed customer charge, rather than a decoupling rider. PGL/NS Response at 8. The Companies fail to mention, however, that these companies have no revenue guarantee for the remaining 20% of their costs, unlike Peoples Gas and North Shore. As for the comment that staying Rider VBA would put the Companies on "worse footing" than other utilities, the fact is that both Ameren electric companies and ComEd have rate designs that recover significantly less costs through the fixed customer charge (about 50% for ComEd[7]; 43% for Ameren Electric [total company][8]). Thus, the Companies' argument that they would be somehow disadvantaged as compared to other utilities rings hollow.

B. The People Have Demonstrated Irreparable Harm to Ratepayers If the Commission Fails to Stay the Rider VB A tariff Or Permit the Collection of Rider VBA Revenues Subject to Refund.

[7] *See* ICC Docket No. 10-0467, Order of May 24, 20122 at 232.
[8] *See* ICC Docket No. 11-0279 (cons.), Schedule E-5, p. 1.

In their Response, the Companies argue that the AG Motion for Stay "argues for application of the Administrative Review Law's standards for a stay of an administrative order" under 735 ILCS 5/3-111(1), and then offer the red herring argument that "[o]f course, the Administrative Review Law does not apply to appeals from the Commission's decisions." PGL/NS Response at 5. This diversionary argument is not only inaccurate (the AG Motion never cites 735ILCS 5/3-111), but also fails to address the principal argument raised in the Motion as to why a Stay is necessary. Unless the Commission grants a stay or an order that Rider VBA surcharges be collected subject to refund, ratepayers could be irreparably harmed. Once the Commission establishes rates, the Act does not permit refunds if the established rates were too high or surcharges if the rates were too low. *Business and Professional People for the Public Interest v. Illinois Commerce Comm'n,* 136 Ill.2d 192, 209, 555 N.E.2d 693 (1989) ("BPI I"); *Citizens Utilities Co. v. Illinois Commerce Comm'n,* 124 Ill.2d 195, 207, 529 N.E.2d 510 (1988). Moreover, if a Commission order that approves a rate increase is subsequently reversed by a court, and the rate increase was not stayed, the ratepayers are not entitled to any refund for excess charges collected between the effective date of the Commission's order and the date of the court's decision. *Independent Voters of Illinois v. Illinois Commerce Comm'n,* 117 Ill.2d 90, 510 N.E.2d 850 (1987). In addition, even if a court reverses the Commission's order in part or in whole, the utility can continue to charge the rates originally approved by the Commission until the agency establishes new rates (although the utility is subject to ratepayers' claims for reparations for excessive rates collected from the time of the Court's reversal through the time new rates are approved by the Commission). *BPI I,* 136 Ill.2d at 242; *People ex rel. Hartigan v. Illinois Commerce Comm'n,* 117 Ill.2d 120, 148, 510 N.E.2d 865 (1987). Collecting rates subject to refund protects ratepayers from illegal and excessive rates that cannot be refunded.

Moreover, as pointed out in the AG Motion at par. 8, the Companies have informed the Commission that they will be filing a new rate case by August 1, 2012. Accordingly, new rates for the Companies will take effect, *at the latest*, by July 1, 2013.[9] Given that (1) refunds are precluded during the pendency of an appeal, unless a stay or collect-subject-to-refund order is granted by the Commission or Court, and (2) the Court is unlikely to issue a decision on the People's appeal of the Commission's January 10, 2012 Order by July 1, 2013, a stay or collect-subject-to-refund order is necessary to preserve the status quo and ensure that ratepayers are not irreparably harmed by the assessment of Rider VBA surcharges between the time the Rider VBA tariff takes effect and the date of an appellate court ruling or the Commission's entry of a new rate order, whichever comes first.

The Companies argue that the AG Motion "ignores the inherent symmetry of Rider VBA" because it triggers surcharges when natural gas sales are lower than expected (e.g., due to warmer than normal weather) but credits when sales are higher than expected (when weather is colder than normal). PGL/NS Response at 10. As such, the Companies imply, there is no harm to customers. The Companies also claim the rider has worked as intended by creating surcharges when customers used less natural gas than expected and credits when they used more. *Id.* This argument misses the mark for a couple of reasons. First, Rider VBA shifts the utilities' risk of revenue recovery historically borne by shareholders by guaranteeing the recovery of a designated amount of revenues – *not costs.* As noted by GCI witness Dr. David Dismukes:

> Revenues, which move with changes in natural gas demand, are a function of prices, weather, economic conditions and a range of other changes in tastes, preferences, and technology. The Companies have little to no control of these factors and have historically borne these business cycle risks in return for a risk-adjusted allowed rate of return on their investments. Revenue

[9] Under Section 9-201(b), the Commission must issue an order within 11 months of the filing of utility tariffs or the tariffs take effect as filed. 220 ILCS 5/9-201(b).

> decoupling simply changes this historic risk relationship by requiring ratepayers to make the utility whole for any downside change in revenues, regardless of the source.

GCI Ex. 9.0 at 5-6.

In addition, notwithstanding the Companies rhetoric to the contrary, there is nothing equitable or "symmetrical" about Rider VBA. As Dr. Dismukes pointed out:

> But for the colder-than-normal winters of 2008 and 2009, the Companies' ratepayers would likely have paid surcharges during one of the most severe economic recessions in this nation's history. At the same time, the Companies' ratepayers had in place a very limited set of energy efficiency programs that they may have been able to use to offset normal weather-related surcharges. So, the Companies would have likely gotten the benefit of being made whole for recession-induced decreases in revenues (under normal weather conditions), and ratepayers would have gotten surcharges. This is clearly not in the spirit of the "balancing" considerations included in the Commission's original Order approving Rider VBA as a pilot, and is one of the primary reasons why the Commission should reject its continuation.

GCI Ex. 9.0 at 21. While the People acknowledge that net refunds resulted in the first three years pilot Rider VBA existed, this was a function of the abnormally cold weather, as discussed by GCI witness Dismukes. The Companies acknowledge that surcharges can arise at any time, depending on the weather primarily. PGL/NS Response at 10. The problem is ratepayers assume all of the risk associated with these rate changes under Rider VBA. *See* GCI Ex. 4.0 at 19; GCI Ex. 9.0 at 19-20. Regardless of the weather and customer usage of natural gas, the Companies will receive their designated revenue requirements going forward. Ratepayers, on the other hand, are placed in a position whereby if they use less of a product (natural gas), they will pay more. There is nothing "symmetrical" or fair about that Rider VBA reality.

The Companies also suggest that no stay is needed because "it is entirely possible that the Appellate Court will rule before" the new Rider VBA effective date of April 1, 2012. PGL/NS

Response at 9. The AG's appeal of the Commission's last Peoples Gas rate order, issued February 5, 2008, is still pending in the Second District. In fact, it is just as "likely" that the Court will not issue an opinion before the tariff effective date. What *is* certain is that ratepayers will not be entitled to refunds between the date the tariff takes effect and the date of an appellate court's ruling on the Rider VBA tariff approved in this docket. *See Independent Voters of Illinois v. Illinois Commerce Comm'n,* 117 Ill.2d 90, 510 N.E.2d 850 (1987). With the warmer than normal weather the Chicago area has been experiencing, ratepayers this winter have and will see surcharges on their monthly bills under the existing Rider VBA that terminates at the end of March. *See* Appendix A, Rider VBA tariff filings, p. 1, line 6, for the months of December and January, 2011 and February, 2012 (which result from the lower than expected actual revenues collected during from October through December, 2011.[10]) The People seek to prevent that possibility from occurring under the new, permanent rider (or at least, that the surcharges be collected subject to refund.), and request that the Commission take administrative notice of the tariff pages in Appendix A to this Reply, pursuant to 83 Ill.Admin.Code Part 200.640(a)(3), as it considers the People's Motion.

C. The Issuance of a Stay (Or Collection of Rider VBA Revenues Subject to Refund) Will Not Harm the Utilities.

The Companies assert in their Response that the issuance of a stay would be against the interests of both customers and the utilities, because "there is no mechanism for customers to get the credits they potentially would have been issued, or for the Utilities to recover any costs they potentially would have recovered." PGL/NS Response at 11-12. Of course, this point only

[10] As shown in these tariffs, Peoples Gas Rate 1 residential customers paid $3.17 million more during the months of December, 2011 through February, 2012 than they would have without Rider VBA as a result of the warmer than normal temperatures experienced during the October through December, 2011 time frame; North Shore Gas residential customers paid an additional $595,685 over the same time period.

acknowledges Illinois law highlighted in paragraph 7 of the People's Motion for Stay: absent a stay, Rate 1 and 2 customers face the prospect of incurring surcharges for *reducing* their utility usage, and will never be refunded those dollars. The value of the benefit referenced by the Companies, i.e. that PGL/NS customers *might* receive credits under Rider VBA, is outweighed by the possibility of incurring surcharges for using less than forecasted levels of natural gas usage. Consumers expect to pay for products and services they receive, including the need for increased heat on colder days. Consumers should feel confident that if they use less heat (due to conservation, warmer weather or new efficiency investments), they will not incur additional surcharges on the delivery portion of their bill. People do not expect to pay retroactive surcharges when they buy less of a product than the utility expected them to buy.

Rider VBA, on the other hand, ignores principles of cost causation and is premised on the importance of preserving the utility's revenues in the face of (either real or hypothesized) declining demand for natural gas. That principle runs contrary to the purpose of regulation, which is to protect consumers from the unfettered market power of monopolies and ensure least cost utility service -- not to protect the revenue stream or profit levels of those monopolies.

To the extent that the Commission is concerned about fixed cost recovery in the face of new energy reduction mandates, punishing ratepayers with additional surcharges for using less energy is inconsistent with the clear public policy goals of the Act promoting efficiency and requiring the least cost delivery of utility services. *See* 220 ILCS 5/1-102(a) and (d) ("The General Assembly finds that the health, welfare and prosperity of all Illinois citizens require the provision of adequate, efficient, reliable, environmentally safe and least-cost public utility services at prices which accurately reflect the long-term cost of such services and which are equitable to all citizens." 220 ILCS 5/1-102; "It is further declared that the goals and objectives

of such regulation shall be to ensure … (d) Equity: the fair treatment of consumers and investors in order that …(iii) the cost of supplying public utility services is allocated to those who cause the costs to be incurred." 2201 ILCS 5/1-102(d).) Section 8-104 of the Act establishes a framework for energy efficiency spending and cost recovery that is consistent with traditional ratemaking principles: utilities are expected to pursue cost-effective least-cost energy efficiency resources. In return, utilities will be allowed cost recovery for their prudently-incurred costs of providing those programs. Conspicuously absent is any allowance or cost recovery for "lost revenues" associated with meeting these statutory goals.

The Company had a legal burden of proving that this unorthodox ratemaking mechanism is both permitted under law and, in fact, necessary from a financial perspective. The Company did neither, and the Commission failed to address the issue of whether the rider is permitted under law – an inexplicable omission given the recent appellate court rulings discussed in this Reply. In the Commission's January 10, 2012 Order, Peoples Gas and North Shore Gas were awarded increases of $57.8 million and $1.9 million, respectively, separate and apart from Rider VBA, that enables them to recover their costs and earn a reasonable return. Staying the collection of revenues under Rider VBA will not harm the Companies, or threaten their ability to recover their cost of service, including a reasonable return on their investment.

III. CONCLUSION

The People's Motion satisfies all of the applicable tests for a motion to stay, as discussed above. The Motion for a Stay of Rider VBA should be granted. In the alternative, the People request that the Commission to enter an order that provides that all surcharges collected (and refunds granted) be subject to refund pending the outcome of the People's appeal of the

Commission's January 10, 2012 Order, and any future Commission order denying the People's request for rehearing in this docket.

Respectfully submitted,

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